Petition

81-1171

Office - Supreme Court, U.S.
FILED
DEC 15 1981
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1 9 8 1

No._____

NELLIE-JEANNE CORPORATION

An Ohio Corporation for Profit, Petitioner,

v.

CITY OF COLUMBUS, DIVISION OF RECREATION AND PARKS

AND

COBAN LIMITED,

AND

THE COUNTY OF FRANKLIN, OHIO

AND

TWENTY FIFTEEN WEST FIFTH, INC.,

AND

BURGESS & NIPLE LIMITED, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

TENTH DISTRICT COURT OF APPEALS

FRANKLIN COUNTY

STATE OF OHIO

CHARLES E. TAYLOR
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Counsel for Petitioner

December 15, 1981

QUESTIONS PRESENTED

A. CAN A STATE COURT MAKE A "FRAUDULENT INTENT" AN ELEMENT OF A SECTION 1983 CAUSE OF ACTION IN DIRECT CONFLICT WITH MONROE VS. PAPE, 365 U.S. 167 (1961), WHICH HOLDS "WILFULLY" SHOULD NOT BE READ INTO THIS CIVIL REMEDY BUT THAT "(1983) SHOULD BE READ AGAINST THE BACKGROUND OF TORT LIABILITY THAT MAKES A MAN RESPONSIBLE FOR THE NATURAL CONSEQUENCES OF HIS ACTIONS."

B. DOES A STATE COURT TRIBUNAL WHICH REFUSES TO ACCORD A 1983 LITIGANT A FULL AND FAIR OPPORTUNITY TO LITIGATE THE FEDERAL CLAIMS WHICH HAVE BEEN PROPERLY RAISED UNDER THE STATE'S PROCEDURES IN DIRECT CONFLICT WITH THE EXPECTATIONS OF ALLEN VS. MCCURRY, 66, L. ED. 308 (1980), SATISFY 28 U.S.C. § 1738 AND/OR THE DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT.

C. DOESN'T A STATE TRIBUNAL IN EXERCISING ITS CONCURRENT JURISDICTION IN ADJUDICATING A FEDERAL 1983 CLAIM HAVE A MANDATORY DUTY TO APPLY THE "FEDERAL SUBSTANTIVE CONSTITUTIONAL LAW" TO THE FACTS SO AS TO AVOID A MULTIPLICITY OF SUITS AND SATISFY THE REQUIREMENTS OF TITLE 28 U.S.C.S. § 1738 AND THE FOURTEENTH AMENDMENT.

D. THIS CASE PRESENTS IMPORTANT QUESTIONS TOUCHING THE ACCOMODATIONS OF STATE AND FEDERAL INTERESTS UNDER THE CONSTITUTION AS THE STATE TRIBUNAL TOTALLY REFUSED TO LITIGATE THE IMPORTANT FEDERAL CLAIMS BY RESORTING TO APPLICATION OF CLEARLY ER-

RONEOUS CONCEPTS OF SOVERIGN IMMUNITY AND PROCEDURAL CONCEPTS AS TO NECESSARY PARTIES IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS OF ADICKES VS. S. H. KRESS & COMPANY, 398 U.S. 144 (1969) AND DENNIS VS. SPARKS, 101 St. CT. 183 (1980).

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PETITION FOR CERTIORARI

The petitioner, Nellie-Jeanne Corporation, respectfully prays that a writ of certiorari be issued to review the judgment of the Tenth District Court of Appeals, Franklin County, Ohio.

OPINIONS BELOW

The opinion of the Tenth District State Court of Appeals, relating to the Federal Claims assigned as error appears in the Appendix hereto. The oral decision and Journal Entry of Judgment by the Trial Court is also appended. The Ohio Supreme Court refused to certify the case on September 16, 1981, thus making Lower Appellate decision the Final Order.

JURISDICTION

The Judgment of the Ohio Supreme Court was entered on September 16, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (2) and (3).

CONSTITUTIONAL PROVISIONS

THE UNITED STATES CONSTITUTION, FIFTH AMENDMENT - "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT - "N)o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

28 U.S.C. § 1738, STATE AND TERRITORIAL STATUTES AND JUDICIAL PROCEEDINGS: FULL FAITH AND CREDIT - "The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . ."

42 U.S.C. § 1983, THE CIVIL RIGHTS ACT - "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen

of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The instant case arises on appeal as a result of a directed verdict at the conclusion of the plaintiff's case in a jury trial claiming common law fraud, conspiracy and violation of plaintiff's Federal Constitutional and Statutory Right to own Property, brought in conjunction with state law claims of fraud and conspiracy. This Appeal only concerns the clearly erroneous dismissal of the Federal claim.

The cause arose as a result of passage of a Resolution of Take for park purposes by the City of Columbus of unblighted residential property. The property was purchased by the City after a legally coerced negotiated settlement under threat of eminent domain. Almost half of the property's valuable frontage was immediately rezoned commercial, and traded to the adjoining property owner, Burgess & Niple, Ltd., and/or its alter ego Coban Limited and Twenty-Fifteen West Fifth, Inc. (hereinafter collectively referred to as Burgess).

Plaintiff claimed that the action of the City was unconstitutional under the Federal Constitution. Count three in part states:

> "The City of Columbus and its co-conspirators acted under the color of state law to deprive plaintiff of its property in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States."

Such take was not for a public purpose, but in substantial part for the private use of another. Plaintiff alleged concealment of the private purpose.

After the directed verdict at the conclusion of plaintiff's case in the trial court, plaintiff appealed to the Court of Appeals, which affirmed the action of the lower court.

The trial court non-suited the petitioner on non-merit issues by erroneously determining a novel concept of immunity as a result of failure of plaintiff to name an individual city employee as a co-conspirator.

> "None of the persons making any claimed representations are here, none of the governmental parties were parties thereto, and immunity extends to other parties." (A. 24.)

The trial court also erroneously decided that

the failure to join the predecessor in title was a fatal defect.

> "No representations were made to the corporation here involved and the predecessors are probably necessary parties to this proceeding." (A. 25.)

The petition assigned these non-merit rulings as error together with specifically assigning the court's error in failing to find a § 1983 Cause of Action as error in the Lower Appellate Court.

The Appellate Court found the non-merit issues moot for the reason that plaintiff had failed to prove fraudulent intent on behalf of the City or the private co-conspirators -- and therefore, no Federal Cause of Action was stated:

> "In the absence of fraud, plaintiff cannot claim that it was deprived of the right to hold property.
>
> * * *
>
> Accordingly, we find no evidence to support plaintiff's cause of action pursuant to 42 U.S.C. Section 1983." (A. 18.)

Since fraud, malice or intent are not a necessary element of a 1983 Cause of Action, plaintiff has never had a full and fair determination of the merit issued by any tribunal. The Ohio Supreme Court refused to certify the question for review.

STATEMENT OF FACTS

Plaintiff's evidence of pre-take conspiracy to deprive petitioner of its constitutional right to own property consisted of admissions and memorandum of the respondants commencing in September 1970, four months before the City notified petitioner of the public "take".

A Burgess representative admitted that at a private meeting in September 1970, with a park official, the respondants discussed a trade of property in exchange for part of the Fellows property.

By October 1970, the Burgess private development plans for petitioner's frontage reached the state where a representative of the Columbus Division of Zoning was included in meetings with the Parks and Forestry Division. It would be necessary to rezone the Twenty-Fifteen property and part of the Fellows property under the secret plan in order to satisfy Burgess.

A private memorandum detailing the meetings prepared by Burgess indicated Burgess suspended "activity" when the City actively started negotiations with Fellows. The "activity" was "suspended" "until the property was purchased by the City." (A.3)

On December 3, 1970, the City, through its Land Acquisition Division, first notified petitioner's predecessor that it intended to acquire her property for a park site.

A family attorney was consulted. The attor-

ney was informed by the City that the intended use was for a park. He testified that he based his advise on his understanding that the property was being taken for public use and that public use was a park. He further testified that had he been told of the intended trade, he would have questioned whether such taking was for a public use.

He also testified that had he been informed of the proposed rezoning and trade, he would have questioned the value offered.

Neither he nor his client at that point had any way of learning, nor did they have any reason to suspect, that certain private individuals and public officials had found a way to subvert the constitutional protection afforded a property owner by the Fifth and Fourteenth Amendments of the Federal Constitution. A presumption of regularity attaches to 'resolutions of take' under Ohio Law.

Upon her lawyer's advise that a sale was the only economically feasible course of action the petitioner's sole stockholder was legally coerced to sell the property to the City at a valuation arrived at on appraisals based on the residential zoning. For tax considerations, she transferred the property to the Nellie-Jeanne Corporation, the petitioner herein, in exchange for all its stock, with the stipulation that the Corporation would complete the sale of the real estate to the City.

Further private conspiracy evidence consisted

of a layout of the usage locating the Burgess office building on the Reed Road frontage owned by Fellows not yet acquired by the City on May 4, 1971. Minutes of the Burgess Board formally approved a proposal to exchange land on May 10, 1971.

The property was transferred by petitioner to the City on May 18, 1971, with the deed recorded May 20th. The next day, Burgess submitted to the City its formal proposal to exchange its back acreage for approximately one-half the Reed Road frontage of the petitioner's former property.

August 3, 1971, there was a tentative agreement between City and Twenty-Fifteen regarding the exchange which was finalized on August 5, 1971, contingent upon zoning.

October 15, 1971, the City Development Commission recommended rezoning of the frontage to the City Council. Minutes of the Commission meeting allude to involvement of the Division of Parks in the land swap plan since November 1970. The City Council knew the take was for private purposes, but nevertheless, ratified the unconstitutional conspiracy of the Parks Division.

Three years after Fellows sold the property, her nephew happened to drive on Reed Road and observed private construction. He stopped, inquired and ultimately learned of the foregoing facts.

REASONS FOR GRANTING THE WRIT

(1) THE DECISION BELOW RAISES A SIGNI-

FICANT AND RECURRING PROBLEM CONCERNING THE SUBSTANTIVE LAW TO BE APPLIED IN ORDER TO RENDER A LITIGANT A FULL AND FAIR HEARING WHEN STATE TRIBUNALS EXERCISE CONCURRENT JURISDICTION IN HEARING SECTION 1983, FEDERAL CLAIMS.

State courts have the legislative power to determinde Federal § 1983 Claims. The instant case again demonstrates the total ineptness of such courts when they exercise such Federal jurisdiction.

A mandate from this court is absolutely essential to apprise the state tribunals that their duty when adjudicating Federally created Rights is to apply the "Federal Substantive Constitutional Law" to the facts. If the Federal Law is ignored, such decisions are not entitled to full faith and credit in subsequently filed Federal Claims.

The Lower State Courts' total indifference to Federal Substantive Law is so blatant as to border on contempt.

The decision in Monroe vs. Pape, 365 U.S. 167 (1961) made it clear that there is no need for a plaintiff in a § 1983 action to plead or prove "intent", whether characterized as wilful, fraudulent, or malicious, to deprive the plaintiff of his Constitutional Rights. The Court stated at page 388:

"In the Screws case we dealt with

a statute that imposed criminal penalties for acts 'wilfully' done. We construed that word in its setting to mean the doing of an act with a specific intent to deprive a person of a federal right . . . We do not think that gloss should be placed on (§ 1983) which we have here. The word 'wilfully' does not appear in (§ 1983). Moreover, (§ 1983) provides a civil remedy, while in the Screws case we dealt with a criminal law challenged on the grounds of vagueness. (§ 1983) should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." (Emphasis added)

Nevertheless, the Franklin County Court of Appeals has totally eliminated this Federally created right by holding a jury issue wasn't raised because:

"In the absence of fraud, plaintiff cannot claim that it was deprived of the right to hold property."

Apparently, to the Lower Court, Federal Constitutional Rights can only be wrongfully taken if the co-conspirations reduce their conspiracies to writing.

The Trial Court's ineptness in dismissing the

case on non-merit issues is even more appalling.

In Dennis v. Sparks, 101 S. Ct. 183 (1980), this court decided judicial immunity does not extend to those who conspire with a State Court Judge. (We don't suspect that that conspiracy was in writing.) The Court stated at page 187:

> "P)rivate parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases. . .
>
> "H)ere, petitioner has pointed to nothing indicating that, historically, judicial immunity insulated from damages liability those private persons who corruptly conspire with the judge."

In an almost unbelievable rejection of this Federal Substantive Law the trial judge created the following novel theory of immunity:

> "None of the persons making any of the claimed representations are here, none of the governmental parties were parties thereto, and immunity extends to other parties." (A.25.)

He also dismissed because of an erroneous concept of non-joinder of a dispensable party. We only raise this error as it relates to the finality to be

accorded the decision in view of Allen vs. McCurry, 66 L. Ed. 2d 308, decided December 9, 1980, where Mr. Justice Powell stated at 317:

> "Collateral estoppel does not apply where the party against whom an earlier decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court."

Exhibit A, Appendix page 2, was admitted by Burgess to be a document it prepared for the eyes of the Zoning Board. Can one seriously state that a jury question of a violation of Section 1983 rights would not have existed in any Federal Tribunal when that memorandum is coupled with the co-conspirator's written offer made the day after the deal was recorded by the City?

Clearly, State Courts can't totally emasculate the Constitution, Section 1983 and this Court's fashioning of Federal Constitutional standards of Due Process.

CONCLUSION

The conduct by the Courts' below demonstrate the apparent necessity of this Court to set the record straight on the State Courts' judicial obligations when adjudicating Federally created rights. Surely, the same essential elements of the Federally created cause of action are to exist whether the actions are brought in State or Federal Courts.

Thus, the eminent authority, Nichol's Eminent Domain, 3d Ed., Section 7.4, states:

> "Where property is taken for public use by eminent domain, the proper exercise of the power is predicted upon the promise that such property will be devoted to the public use for which it is taken within a reasonable time after the taking. If the ostensible use is merely a cloak for an ulterior private use, it is invalid, and constitutes a fraud upon the owner. It is immaterial, in such case, that an actual fraudulent intent cannot be attributed to the condemnor." (Emphasis added.)

For state tribunals to refuse to adjudicate such unconstitutional takings when case in a § 1983 setting will only serve to cause double litigation, as in the instant case, where a subsequent action has been filed in District Court to obtain a "merit" hearing. The writ should be granted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1 9 8 1

No._____

NELLIE-JEANNE CORPORATION, PETITIONER,

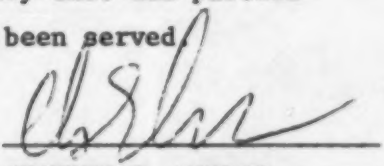
v.

CITY OF COLUMBUS,DIVISION OF RECREATION & PARKS, et al.,

RESPONDENTS.

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of December, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Gregory S. Lashutka, Esq., Gregory Dunn, Esq., City of Columbus, City Hall, 90 West Broad Street, Columbus, Ohio 43215; Louis E. Gerber, Esq., Knepper, White, Arter & Hadden, 180 East Broad Street, Fourth Floor, Columbus, Ohio 43215; Michael Miller, Esq., Franklin County Hall of Justice, 369 South High Street, Columbus, Ohio 43215, Counsel for the Respondents. I further certify that all parties required to be served have been served.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1 9 8 1

No._____

NELLIE-JEANNE CORPORATION, Petitioner,

v.

CITY OF COLUMBUS,DIVISION OF RECREATION & PARKS, et al.,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1981, three copies of the Petition for Writ of Certiorari and the Appendix were mailed, postage prepaid, to Gregory S. Lashutka, Esq., Gregory Dunn, Esq., City of Columbus, City Hall, 90 West Broad Street, Columbus, Ohio 43215, Louis E. Gerger, Esq., Knepper, White, Arter & Hadden, 180 East Broad Street, Fourth Floor, Columbus, Ohio 43215, Michael Miller, Esq., Franklin County Hall of Justice, 369 South High Street, Columbus, Ohio 43215. Counsel for the Respondents. I further certify that all parties required to be served have been served.

Charles E. Taylor
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Appendix

81-1171

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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

NELLIE-JEANNE CORPORATION, Petitioner,

v.

CITY OF COLUMBUS, DIVISION OF RECREATION & PARKS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

10th DISTRICT COURT OF APPEALS,

FRANKLIN COUNTY,

STATE OF OHIO

PETITION FOR CERTIORARI FILED DECEMBER 15, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

NELLIE-JEANNE CORPORATION, Petitioner,

v.

CITY OF COLUMBUS,DIVISION OF RECREATION & PARKS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

10th DISTRICT COURT OF APPEALS,

FRANKLIN COUNTY,

STATE OF OHIO

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Plaintiff's Trial Exhibit 10

August 6, 1971

GENERAL INFORMATION

Twenty Fifteen West Fifth, Inc. purchased their 14 acres of land fronting on Reed Road from Bishop Elwell in September, 1970.

The same month, representatives of Burgess & Niple, Limited met with members of the Columbus Division of Parks and Forestry to ascertain what plans the Division might have for the development of a park in the area and what our mutual interests might be. It was learned that the Division of Parks at that time was planning to acquire the Nellie B. Fellows tract abutting Twenty Fifteen on the south and they indicated an interest in possibly a trade arrangement with Twenty Fifteen whereby they could obtain additional land creating a larger park and with a configuration much better suited to Park activities. Burgess & Niple, Limited's interest was a site upon which they could erect their new office facilities.

A meeting was held the following month with the Columbus Division of Zoning representative to advise of the discussion with Parks and to find out the procedures that would be necessary for rezoning a portion of the Twenty Fifteen West Fifth, Inc. property for office use by Burgess & Niple, Limited.

During November, 1970, additional discussions

were held with the Division of Parks concerning various planning arrangements for park and office use. Also, another discussion was held with the Division of Zoning regarding procedural matters.

In December, 1970 Burgess & Niple, Limited was advised that the City was actively negotiating for the acquisition of the Nellie B. Fellows property and, as a result, all activity in the matter was suspended until the property was purchased by the City.

In May, 1971 Burgess & Niple, Limited representatives had several meetings with officers and representatives of the Northwest Civic Association to acquaint them with the thinking of the Division of Parks and Burgess & Niple, Limited, and to incorporate their suggestions in the proposed planning. It is our opinion that the Civic Association is very much in favor of this proposed planning. Additional meetings were held also with the Division of Parks, and, on May 21, 1971, a proposal was submitted to the City of Columbus to effect the necessary exchange of property. On August 3, 1971 agreement was reached with the City on the terms of the exchange.

Exhibit A

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Nellie-Jeanne Corporation,

Plaintiff-Appellant,

v. No. 80AP-379

City of Columbus, Division of
Recreation and Parks, et al.,

Defendants-Appellees.

D E C I S I O N

Rendered on May 7, 1981

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and
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180 East Broad Street-4th Floor,
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For Defendants-Appellees Burgess &
Niple, Twenty Fifteen West Fifth,
Inc., and Coban, Ltd.
and *
1209)MR. MICHAEL MILLER, Prosecuting Attorney,
MR. JAMES R. KIRK, Senior Assistant,
Franklin County Hall of Justice,
369 South High Street
Columbus, Ohio 43215,
For Defendant-Appellee Franklin County,
Ohio.

STRAUSBAUGH, P.J.

This is an appeal by plaintiff from a judgment of the Common Pleas Court granting defendants' motion for a directed verdict.

On January 19, 1970, the Columbus City Council adopted Resolution No. 10X-70 "to declare the necessity and intent to appropriate fee simple title in and to real estate in connection with the Six Park Sites Projects* * *." The descriptions of the properties to be appropriated included a 13.42 acre tract then owned by Nellie B. Fellows. (Plaintiff's exhibit No. 8.) Also, during 1970, defendant Twen-

ty Fifteen West Fifth, Inc. purchased an adjacent 14.074 acre tract for the purpose of developing a business office for defendant Burgess & Niple, Ltd. (Tr. 11.) It should be noted that the stockholders of defendant Twenty Fifteen West Fifth, Inc. are the partners in defendant Burgess & Niple, Ltd.

Nellie Fellows received formal notice of the city council's resolution on March 18, 1971; however, negotiations with the Land Acquisition Division of the City Attorney's Office had been conducted since December, 1970. By letter dated December 10, 1970, Nellie Fellows was offered $134,000 from the Land Acquisition Division for the purchase of the property. (Plaintiff's exhibits 9 & 10.) After further negotiations and upon the advise of counsel, Nellie Fellows decided to accept an offer of $136,000 made by the city to purchase the property. (Tr. 55-60.) However, prior to the sale, 1210) Nellie Fellows transferred the 13.42 acre* tract to the plaintiff corporation for tax considerations. (Tr. 60-61.) Said plaintiff corporation executed a warranty deed for the transfer of said property to defendant City of Columbus on May 18, 1971.

On August 5, 1971, defendants City of Columbus and Twenty Fifteen West Fifth, Inc. entered into an agreement whereby the city was to transfer to Twenty Fifteen West Fifth, Inc. 4.804 acres of land originally bought by the city from plaintiff

in exchange for a 9.804 acre tract off the rear of the adjacent property owned by Twenty Fifteen West Fifth, Inc. (Plaintiff's exhibit 14.) Said trade of property is evidenced by deeds exchanged by the respective defendants, which were properly recorded on September 29, 1972. (Plaintiff's exhibit 29.)

Plaintiff alleged within the amended complaint that defendant City of Columbus made fraudulent representations as to the intended use of the property during the negotiations with plaintiff. Plaintiff claims that the city acted fraudulently by concealing the negotiations, which took place between the city and defendant Burgess & Niple, Ltd. concerning the rezoning of its property and a trade of its rear acreage to the city.

After the presentation of plaintiff's case, defendant moved for a directed verdict, which the trial court granted. In appealing the decision of the trial court, plaintiff raises the following assignments of error:

> "1. The lower court erred in granting a directed verdict at the conclusion of plaintiff's case in failing to construe the evidence most favorably for the plaintiff-appellant and failing to conclude the reasonable minds could differ as to the conclusions to be drawn from the evidence submitted.

1211) "2. The trial court erred in finding

a municipality may take private property under eminent domain powers for the private use of another.

"3. The trial court erred in failing to find that the exercise of eminent domain is predicated upon the promise that such property will be devoted to public use for which it is taken and if the ostensible use is merely a cloak for an ulterior private use, it is invalid, and constitutes a fraud upon the owner.

#4. The trial court erred in holding that under eminent domain power, a city may take unblighted vacant residentially zoned property for the purpose of rezoning the frontage and trading the same to an adjacent property owner.

#5. Even if the power to take unblighted property for rezoning and swapping exists, the trial court erred in failing to find a fraud was committed when such private purpose is concealed from the property owner, as the purpose of excess appropriations must be specifically defined and the necessity of the excess taking proved.

"6. The trial court erred in failing

to find that private entities that knowingly participate in a scheme to acquire 4.511 acres of frontage from a neighbor by having the municipality 'legally coerce' a sale to the municipality from the neighbor through a threat of eminent domain proceedings while concealing the intended ultimate 'swap' and rezoning, are jointly liable with the municiplaity for fraud.

"7. The trial court erred in failing to find that when a municipality that falsely states the 'public purpose' for which it ostensively is taking land in its resolution of take and subsequent negotiations and conceals its actual intent to immediately rezone and trade 4.511 acres of a total take of 13.42 acres, voids any transfer made based upon such false representations as a matter of law. Such transaction is outside the city's capacity and any instruments of conveyance thereunder, are void as a matter of law.

"8. The trial court erred in failing to find that the concealment of an intended imminent rezoning to a higher use and 'swap' of such rezoned land 1212) to a private entity constitutes a

violation of a citizen's constitutional and common law property rights to own and hold real estate. Private party defendants who conspire with the city to acquire 'private property' for such 'private' use are jointly liable with the city for any compensatory damages sustained by the party who was so defrauded.

"9. The trial court erred in failing to find that the title acquired by any private co-conspirator from the municipality is void or voidable, and that the defrauded property owner is entitled to a return of the real property.

"10. The trial court erred in finding that a cause of action was not stated under 42 U.S.C. Sec. 1983, otherwise known as the Civil Rights Act.

"11. The trial court erred in failing to find a cause of action was stated under common law for conspiracy.

"12. The trial court erred in failing to find a cause of action was stated under common law, equity jurisprudence, and Revised Code 2913.01 for fraud.

"13. The trial court erred in failing to admit evidence of wealth of a private co-conspirator where evidence was submit-

ted from which the jury could find willful and wanton conduct as well as a corrupt state or condition of affairs.

"14. The trial court erred in finding that sovereign immunity exonerated the municipal defendant and the private party defendants from their wrongful conduct.

"15. The trial court erred in failing to apply the law of ratification to a municipality where the governmental processes were subverted by concealment of the municipal employees' secret plan to effectuate an eminent domain acquisition of 4.511 acres of valuable frontage for the benefit of a private co-conspirator when the municipality's responsible supervisors actually carried out the plan after disclosure was made of the secret plan to 'rezone' and 'swap' the property for the benefit of a co-conspirator.

1213) "16. The trial court erred in failing to impute to the municipality the knowledge of its agents acquired in the course of their employment where such agents were entering into secret plans to acquire private land under the auspices of eminent domain for the private

use of another. This is especially true when disclosure was made to the municipal supervisors prior to the completion of such illegal rezoning and swap.

"17. The trial court erred in finding that sovereign immunity applied to the municipality and private party conconspirators.(sic)

"18. The trial court erred in finding that the plaintiff had no standing to obtain relief."

An examination of the eighteen assignments of error indicate that the first nine assignments of error and the twelfth assignment of error essentially raise the same issue. They, therefore, will be treated together. Said assignments of error are based on the argument that the trial court erred in finding that plaintiff failed to present sufficient evidence to indicate that defendants acted fraudulently. It is plaintiff's contention that, by construing the evidence in a light most favorable to plaintiff, reasonable minds could differ on the issue of whether the defendants engaged in fraudulent activities. We disagree.

In the case of Klott v. Associates Real Estate (1974), 41 Ohio App. 2d 118, this court defined the elements which constitute fraud. There must be an actual or implied representation or concealment of a matter of fact, which relates to the present or

past, and which is material to the transaction. Said representation or concealment must be made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred. The accused must have made the misrepresentation with the intent of misleading another into relying upon it. There must be re-
1214) liance*upon the misrepresentation by the other person, with a right to so rely, and proof of injury of the consequences of such reliance.

Plaintiff alleges that the city acted fraudulently by entering into an agreement to purchase the property with plaintiff knowing of the trade arrangement with defendant Burgess & Niple, Ltd. Plaintiff also alleges that the city acted fraudulently by negotiating a purchase of the property with plaintiff under the threat of an appropriation proceeding when the city knew of the eventual trade, giving defendant Burgess & Niple, Ltd. a parcell of the property formerly owned by plaintiff.

A careful review of the evidence introduced by plaintiff in the presentation of its case, construed in a light most favorable to plaintiff, reveals that plaintiff has failed to establish that the city made any misrepresentation or concealment of a material fact in the conduct of its negotiations with plaintiff. Plaintiff places great weight on a general information memorandum, plain-

tiff's exhibit #10, dated August 6, 1971, written by an officer of defendant Burgess & Niple, Ltd. and representatives of the Columbus Division of Parks and Forestry took place and that the representatives of the Parks Department indicated an interest in "a trade arrangement" of properties. Even after construing the evidence most strongly in favor of plaintiff, a reasonable mind could only conclude that the city, throughout the negotiations with plaintiff, had not made an agreement with defendant Burgess & Niple, Ltd. for the exchange of parcels and that the city always had the intent of using all of plaintiff's property as a park during its negotiations with plaintiff. There is 1215) no indication in the*record that the city's interest in purchasing plaintiff's property, under the threat of appropriation proceedings, was based on the prospects of reaching an agreement concerning the trade of property with defendant Burgess & Niple, Ltd.

Such a finding is supported by further language contained in plaintiff's exhibit #10 which indicate that because the city was involved in active negotiation with plaintiff in December, 1970, all activity in the matter by defendant Burgess & Niple, Ltd. was suspended. Plaintiff's exhibit #40(A), a memorandum dated December 30, 1970, indicates that at the meeting referred to in plaintiff's exhibit #10, representatives of

the Division of Parks expressed an interest in acquiring a parcel of the property owned by defendants Burgess & Niple, Ltd. In fact, a review of the testimony of Warren J. Cremean, Director of Public Service at the time in question (Tr. 189-193), the testimony of Grant Dyer, Administrator of the Zoning Department at the time in question (Tr. 170-173), and plaintiff's exhibits 37, 44 and 49 indicate that defendant's first proposal of a trade with the city occurred after the sale of the 13.42 acre tract by plaintiff to the city had been completed.

Plaintiff also claims that the city acted fraudulently by inducing plaintiff to agree to sell its property by threatening plaintiff with an appropriation action when the city, in fact, would not have been able to trade properties had the city acquired the plaintiff's property by appropriation. It is plaintiff's contention that any exercise by the city of its power of eminent domain would be invalid in this case, because defendant Burgess & Niple, Ltd. would have received benefits from said taking by virtue of its eventual ownership of 4.804 acres of real estate obtained by the city from plaintiff.

1216) The power of eminent domain is defined as the power of a sovereign state to take, or authorize the taking of, private property for a public use without the owner's consent, conditioned upon the

payment of just compensation. As stated previously, the record reveals that the city always had the intent of using all of plaintiff's property as a park during its negotiations with plaintiff. Even if the city had appropriated plaintiff's property, a subsequent trade of a parcel of that property by the city would not have made its exercise of its eminent domain power invalid.

In the case of Babin v. City of Ashland (1953), 160 Ohio St. 328, the Ohio Supreme Court held that within the powers of local government protected by Article XVIII of the Ohio Constitution is the legislative power to determine whetherland, which has been conveyed to a municipal corporation in fee simple for a public use or purpose, with no provision for forfeiture or reversion, is no longer needed for municipal purposes, and to dispose of such property where it is done for a public purpose of interest and advantage to the inhabitants of the municipal corporation. The facts of this case indicate that the trade of property with defendant Burgess & Niple, Ltd. occurred pursuant to an ordinance passed by the city council and approved by the mayor. In the absence of any evidence presented by plaintiff indicating a clear and palpable abuse of power, this court cannot substitute its judgment for the legislative decision by the city council to authorize the trade of property. City of Steubenville, ex rel. Balckburn v.

Targoss (1965), 3 Ohio App. 2d 21.

Based on the above, we find that plaintiff presented no evidence that the city acted fraudu-
1217) lently in the conduct of the*negotiations to purchase plaintiff's property. Accordingly, plaintiff's first through ninth assignments of error and the twelfth assignment of error are not well taken and are overruled.

In support of the tenth assignment of error, plaintiff asserts that it introduced substantial evidence to support a cause of action against defendants pursuant to 42 U.S.C. Section 1983. Said cause of action is based on plaintiff's allegation that defendants wrongfully conspired to deny plaintiff its constitutional right to hold property.

In the case of Adickes v. S. H. Kress and Company (1970), 398 U.S. 144, the United States Supreme Court defined the elements required to be established to recover under the terms of Section 1983 as follows:

> 1. Deprivation of a right secured by the Constitution of the United States.
> 2. Said deprivation must occur as a result of a defendant acting under the color of any statute, ordinance, regulation, custom or usage of a state.

An examination of the record in this case allows this court to conclude that plaintiff has failed to demonstrate either required element.

Plaintiff's contention that it was deprived of the right to own property is without merit. The facts of the case indicate that plaintiff's property was purchased by the city pursuant to a voluntary agreement with plaintiff. In the absence of fraud, plaintiff cannot claim that it was deprived of the right to hold property. It should also be noted that, based upon our treatment of the previous assignment of error, the city, in the purchase of plaintiff's property, cannot be found to have acted "under color of law." As defined by the United States Supreme Court in United States v. Classic (1941), 313 U.S. 299, the phrase "under color of law" implies that there has been a mis-1218) use of power on the*part of a state official which occurred only because said official was clothed with the authority of state law. We find no evidence of misuse of power or fraudulent activity on the part of any city official in this case.

Accordingly, we find no evidence to support plaintiff's cause of action pursuant to 42 U.S.C. Section 1983. The tenth assignment of error is not well taken and is overruled.

In support of the eleventh assignment of error, plaintiff argues that the cause of action for civil conspiracy is of such breadth as to fully accommodate the fraud, as demonstrated by plaintiff's evidence in this case. In the case of

Minarik v. Nagy (1963), 8 Ohio App. 2d 194, the court found that the cause of action for civil conspiracy arises from the acts of the conspiracy which cause damage to the plaintiff. In this case plaintiff has alleged that the city and defendant Burgess & Niple, Ltd. conspired to fraudulently induce plaintiff to sell his property. Because plaintiff has failed to properly show any evidence of a fraudulent act on the part of either of the defendants, the cause of action for civil conspiracy must fail. Accordingly, plaintiff's eleventh assignment of error is not well taken and is overruled.

In support of the thirteenth assignment of error, plaintiff contends that the trial court erred by failing to admit evidence of the financial condition of defendant Burgess & Niple, Ltd. In light of this court's previous finding as to the failure of plaintiff to present any evidence of fraudulent activities on the part of the defendants, any evidence concerning the financial condition of the defendant was irrelevant. Accordingly, plaintiff's thriteenth assignment of error is not well taken and is overruled.

1219) The fourteenth and seventeenth assignments of error claim that the trial court erred in applying the doctrine of sovereign immunity as a defense to plaintiff's claim for fraud. In light of our previous findings, the issues raised by

said assignments of error are moot. The directed verdict in favor of defendants arose from the failure of plaintiff to sustain its burden or proof as to the fraud. Even if this court were to find in favor of plaintiff on the issues raised by said assignments of error, there would be no reason to reverse the decision of the trial court granting defendant's motion for directed verdict. Accordingly, plaintiff's fourteenth and seventeenth assignments of error are found to be moot and are overruled.

Because of our previous ruling as to the failure of plaintiff to introduce sufficient evidence of fraudulent activity on the part of defendants, plaintiff's fifteenth and sixteenth assignments of error are overruled. As stated previously, the plaintiff failed to introduce any evidence indicating that any person employed by either defendant acted fraudulently. In the absence of such proof, the trial court had no reason to apply the legal doctrines of ratification or imputation of liability to the defendants. Therefore, plaintiff's fifteenth and sixteenth assignments of error are not well taken and are overruled.

In support of the eighteenth assignment of error, plaintiff contends that the trial court erred in finding that plaintiff had no standing for relief. An examination of the record reveals the

plaintiff has misinterpreted the trial court. When the trial court granted defendants' motion for a directed verdict, it stated the following:

1220) "* * *The Court further observes that there is probably a deficiency of parties here under certain circumstances. No representations were made to the corporation here involved and the predecessors are probably necessary parties to this proceeding* * *." (Tr. 370 and 371.)

Pursuant to Civ. R. 21, a trial court, of its own initiative, may drop or add parties on such terms as are just at any state of the trial. We interpret the above statement of the trial court to indicate that, if the trial were to continue, it would probably be necessary to name plaintiff's predecessors as party plaintiffs to this cause of action.

An examination of the record reveals no indication that the trial court based its decision to grant defendants' motion for a directed verdict on the basis that plaintiff had no standing to recover or was not the real party in interest. The trial court properly granted defendants' motion for a directed verdict on the basis of the evidence presented by plaintiff and not on the fact that continuance of the trial would require joinder of other persons are party plaintiffs. Accordingly,

plaintiff's eighteenth assignment of error is not well taken and is overruled.

This court, having overruled all eighteen assignments of error presented by plaintiff, hereby finds that the judgment of the trial court granting defendants' motion for a directed verdict is hereby affirmed.

Judgment affirmed.

REILLY AND MOYER, JJ., concur.

ORAL DECISION OF TRIAL COURT (FLOWERS, J.)
(May 8, 1980)

THE COURT: Members of the Jury, the evidence on behalf of the Plaintiff is complete. At the conclusion thereof the Defendants have moved for what is known in law as a motion for a directed verdict as it relates to each of the Defendants.

Basically in such a motion the Court is required to construe the evidence most strongly in favor of the parties against whom the motion is directed, namely, the Plaintiff, and find that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted, and that conclusion is adverse to such party, or if -- the Plaintiff in this instance.

Basically the facts in this case are -- the basic facts are not in dispute. It involves primarily a question of law.

However, those facts had to be made a matter of record befo e the Court was in a position to rule upon any such motion which, in essence, is the nature of a motion to dismiss in advance of hearing.

You are advised generally, and would be if this case were submitted to you for determination of the facts, that under the Constitution of the State, property may be taken for public purchases, and even in excess of amount needed under cer-

tain circumstances.

There is case law to the effect that even though it may be taken, even though it is contemplated that at some future time there would be no use or right to use the property taken on the part of the public or some limited portion thereof.

However, it is always the primary purpose of the power or of the acquisition which is under consideration in a given case. Here the property taken, certainly a larger portion of it was for park purposes. It could not be taken for excess and sold immediately or soon thereafter.

What started out to be an effort to sell a related portion of the City developed into a trade, and with the acquisition questioned in the first instance under those circumstances this court concludes that that is permissible and not at all improper.

This case, so far as Plaintiffs presenting a case, is deficient not in that respect, but there is a general immunity which applies to the City. None of the persons making any claimed representations are parties here, none of the governmental parties were parties thereto, and immunity extends to other parties.

There is no basis for cancellation. The Court concludes since there has been no evidence of a tender back, the only thing that would relieve making such a tender is were this transaction void

in the first instance.

In considering the evidence in the most favorable light, in even were there misrepresentations or concealment, it could only be voidable and not void from its inception.

As it is indicated, there is a constitutional authority to acquire excess under certain circumstances.

It might have been better in this instance had the City notified the Plaintiffs or the predecessor of Plaintiff, namely, Mrs. Fellows, of this contemplated trade, but they were under no duty to notify, and under those circumstances the Court further observes that there is probably a deficiency of parties here under certain circumstances. No representations were made to the corporation here involved and the predecessors are probably necessary parties to this proceeding.

In any event, the Court does conclude that as a matter of law and determining as a matter of law that the motion for a directed verdict will be sustained as it pertains to all of the Defendants.

You will stand as charged and will shortly report back to the Jury Assignment Commissioner. Again, you might wonder why you had to sit here three or four days to hear evidence and then have the case taken away from you, and as I have indicated, it is necessary before the Court can rule on these matters that these be made a part of the

record.

So, you will now stand discharged and should report back to the Jury Assignment Commissioner.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus.

Nellie-Jeanne Corporation, Appellant,

vs.

City of Columbus, et al., Appellees.

1981 TERM

To wit: SEP 16 1981

No. 81-1021

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20,00, paid by Stewart R. Jaffy

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____day of

_____19_____

_____Clerk

_____Deputy

Opposition

1

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NELLIE-JEANNE CORPORATION,

Petitioner,

v.

CITY OF COLUMBUS, DIVISION OF RECREATION AND PARKS *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Tenth Appellate District, Franklin County, Ohio

BRIEF OF BURGESS & NIPLE, LTD, TWENTY-FIFTEEN WEST FIFTH, INC. AND COBAN, LTD. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES INVOLVED

Section 163.08, Ohio Revised Code, provides, in pertinent part:

> Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifi-

> cally denied in the answer and the facts relied upon in support of such denial are set forth therein. . . .

Section 163.09(B), Ohio Revised Code, provides, in pertinent part:

> (B) When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. . . .

STATEMENT OF THE CASE

Petitioner brought this suit against the City of Columbus, Ohio in May, 1976 in the Court of Common Pleas of Franklin County, Ohio. Following discovery, Petitioner obtained leave to file an Amended Complaint in May, 1977 joining Burgess & Niple, Limited, Twenty-Fifteen West Fifth, Inc., Coban Limited,[1] and Franklin County, Ohio. In response to a Motion to Dismiss raising the statute of limitations, a Second Amended

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[1] Pursuant to Rule 28.1, the Court is advised that Burgess & Niple, Limited is a limited partnership association under Ohio law engaged in professional engineering. Offices are presently located in Ohio, Kentucky, West Virginia and Texas. Twenty-Fifteen West Fifth, Inc. was an Ohio corporation until it was dissolved, which was owned by the senior members of Burgess & Niple. Twenty-Fifteen was the owner of an office building in Columbus, Ohio formerly used by Burgess & Niple. Coban, Limited is a limited partnership under Ohio law, which consists of certain members of Burgess & Niple. Coban acquired the real property involved in this action, which is now the location of the Columbus home office of Burgess & Niple.

Complaint was filed in March, 1978. Additional discovery, and proceedings on Motions for Summary Judgment followed.

Trial to a jury commenced May 5, 1980. Motions for directed verdict were granted in favor of all defendants at the close of Petitioner's case following three and one-half days of trial. The trial transcript is in excess of 350 pages in length. The decision was affirmed by the Court of Appeals for the Tenth Ohio Appellate District in May, 1981. (App. to Petition, at 4). The Supreme Court of Ohio denied further review on September 16, 1981.

The focus of Petitioner's case below was the claim it was defrauded when its land was purchased by the City of Columbus in May, 1971. Without filing eminent domain proceedings the City purchased an undeveloped, rectangular parcel from Petitioner containing approximately 13.5 acres. Petitioner was paid $136,000. This price was slightly in excess of the fair market value of the land determined in two, independent fee appraisals obtained by the City. Agreement to the sale was reached with Petitioner's predecessor in interest prior to April 5, 1971, when Petitioner was incorporated for tax shelter purposes.

Following formal transfer of the land to Columbus in May, 1971 negotiations commenced for a trade by the City with its immediately adjacent neighbor, Respondent Burgess & Niple. Burgess & Niple had purchased the neighboring, virtually identical rectangular, 13.5 acre tract in 1970. It intended to construct thereon a new home office building. That tract too was undeveloped land.

As the courts below found, no agreement was even tentatively reached for a land trade until four months after Petitioner agreed to sell. [2] Ultimately of course a trade did occur. The City

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[2] A typographical error in the trial court transcript, (corrected by the Reporter while the case was on appeal), is in the Appendix at page 24. The trial court actually stated "this case . . . is deficient not *only* in that respect. . . ." (A. at 24, line 20).

gave up 4.5 acres (of the 13.5 which it had purchased from Petitioner), obtaining in return 9.8 acres from the rear of the Burgess & Niple property. Today Northcrest Park is thereby larger in acreage, wider in size, and set back from a major, adjoining city street.

The trade arrangement was approved by civic groups, and various city administrators whose evidence at the trial confirmed the advantages to the Columbus Division of Parks in having a larger, squarer park, set back from the roadway. Columbus City Council formally approved all steps in the transaction in public proceedings. The United States Department of Housing and Urban Development approved the trade in April, 1972.

Allegedly unaware of the entire transaction until sometime in 1974 when an officer observed construction of the Burgess & Niple office building, Petitioner did not bring suit until two years thereafter. It avoided the statute of limitations defense on the theory the Ohio fraud statute had been tolled until "discovery" in 1974.

ARGUMENT

The Petition should not be granted. This Court need not expend its limited time dealing with an unfocused, intemperate attack on "Lower State Courts" asserted to have "total ineptness . . . when they exercise . . . Federal jurisdiction" and to hold "total indifference to Federal Substantive Law." (Petition, at 9). In enacting 28 U.S.C. § 1738 (1966) the Congress recognized the competence and integrity of the 50 state court systems. This Court's recent decisions expressly do likewise. *Allen* v. *McCurry*, 449 U.S. 90, 105 (1980), *Stone* v. *Powell*, 428 U.S. 465, 493 n.35 (1976), *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975).

An examination of the state Court of Appeals decision in this case demonstrates Petitioner received a full, fair hearing on the

factual merits of its claim. That examination focused on the Section 1983 claim as well as upon the state cause of action for fraud which has been the heart of this litigation.

Intemperate remarks are not a substitute for a reasoned showing under Rule 17 of this Court. Inasmuch as Questions Presented "C" and "D," and the "Reasons for Granting the Writ" (Petition at 8) offer nothing else, it should be denied.

Question Presented "B" raises the prospective res judicata effect of this case. That question is premature. While Petitioner recently filed virtually an identical suit in the United States District Court for the Southern District of Ohio, that Court has not yet ruled on the res judicata question, and the proper application of *Allen* v. *McCurry, supra*. It requires no citation of precedent to assert that this Court should not reach out to address a question prematurely, and before it has been considered by the lower courts. That is particularly true where the *McCurry* case has been so recently decided in this court, and little scholarly or decisional discussion of its implications has yet developed.

Question Presented "A" and much discussion in the balance of the Petition raises a wholly illusory matter. It is contended that the state appellate court engrafted an additional element of intent on Section 1983. Not only does this distort the decision which plainly did no such thing, but it deftly avoids discussing the factual findings completely adverse to Petitioner, and the threshold question whether there can be a Section 1983 claim in this case.

Nearly thirty years ago this Court recognized that governmental authority under the eminent domain power was plenary so long as just compensation was paid for any property taken. A unanimous Court held:

> The rights of . . . property owners are satisfied when they receive that just compensation which the Fifth

> Amendment exacts as the price of the taking. *Berman* v. *Parker*, 348, U.S. 26, 36 (1954).

Berman v. *Parker* thus stands for the proposition that at least in eminent domain-related land acquisitions there is no federal constitutional right to contest anything other than the amount of compensation paid for the property.

Lower federal court decisions also cast doubt on the vague "Federal Constitutional and Statutory Right to own Property" upon which Petitioner's federal claim relies. Thus the Court of Appeals for the Sixth Circuit has held a claimed "right to acquire, possess and enjoy . . . property free from official caprice" fails to state a Section 1983 claim. *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673, 679-80 (6th Cir. 1976), *cert. denied* 430 U.S. 946 (1977). However most critical in this regard is this Court's decision last Term in *Parratt* v. *Taylor*, ____ U.S. ____ , 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

Petitioner is much like the prisoner in *Parratt* who lost his hobby kits. Petitioner had full state law remedies available to it. Nellie-Jeanne Corp. had the opportunity to contest both the fact of the taking of its land, and its valuation in state court in 1971. Two Ohio statutes in the state Uniform Eminent Domain Act expressly permit a landowner's Answer to contest "[t]he agency's right to make the appropriation." Sections 163.08 and 163.09(B), Ohio Revised Code. *See also, Cincinnati Gas & Electric Co.* v. *Pope*, 54 Ohio St. 2d 12, 374 N.E.2d 406 (1978). Petitioner voluntarily waived these remedies, rather than putting the City of Columbus to its proofs in 1971.

While Petitioner no longer has its real property, it was simply not lost without due process. Instead, as in *Parratt*, the property was taken under circumstances in which "the State had provided . . . the means of which . . . [Petitioner could] receive redress for the deprivation." 101 S.Ct., at 1917, 68 L.Ed.2d, at 434. Indeed state law remedies provided to Petitioner really

included not only the eminent domain code remedies which it, and its counsel, waived back in 1971, but also the full right to raise common law fraud claims as done in this very suit commenced in 1976. Abundant due process protections have thus been afforded.

The superficial nature of Petitioner's federal claim is indeed most evident when it contends its predecessor in interest, Mrs. Fellows, was "legally coerced to sell the property to the City." (Petition at 7). At no point was a condemnation action even filed against Mrs. Fellows or this tax-shelter corporation. However even if it had been, the institution of formal condemnation proceedings "under statutes calculated to ascertain and award just compensation" does not violate any federally protected right. *Baldwin* v. *Appalachian Power Company*, 556 F.2d 241, 242 (4th Cir. 1977).

The most Petitioner can claim is that the City of Columbus "notified petitioner's predecessor that it intended to acquire her property for a park site." (Petition at 6). This is claimed to have produced "a legally coerced negotiated settlement under threat of eminent domain." (Petition at 3).

Two cases remarkably similar to this one, in which claims of fraud and misrepresentation were lodged against the United States in connection with its real property acquisitions, are noteworthy in respect of such a claim. Both held it was not "duress" to advise landowners that condemnation actions would be instituted if agreements for sale were not reached. *Loesch* v. *United States*, 645 F.2d 905, 920 n.19 (Ct. Claims), *cert. denied* 50 U.S.L.W. 3465 (1981); *Beatty* v. *United States*, 168 F.Supp. 204 (Ct. Claims 1958). Yet precisely that claim lies at the heart of Petitioner's superficial argument that its "rights" were violated.

There were no federally guaranteed rights denied Petitioner. It had a full, unfettered opportunity to require formal conde-

mnation to be filed, and insist upon proof of "public use" and necessity for the appropriation. It negotiated with the City for increased compensation, and waived procedural rights after consulting counsel. Years later it was afforded yet another remedy under state common law, to attempt rescission of the 1971 transaction. Nothing in the federal Constitution or statutes guaranteed it more. No Section 1983 remedy exists in these circumstances. *See also, Paul* v. *Davis*, 424 U.S. 693 (1976).

The Ohio courts did not rest decision on the absence of a legal basis for a Section 1983 claim. Petitioner's evidence was evaluated not only in respect of its claim of fraud, but also in respect of Section 1983. In doing so the Ohio courts performed precisely the type of two-step analysis appropriate in a suit under Section 1983. Absent fraud or some other basis for rescinding the voluntary 1971 transfer of land, that transfer could not be reopened. In other words, even if some federally protected right were at stake in this matter, Petitioner could not demonstrate any injury to such a right without proving some irregularity occurred back in 1971. That it failed to do.

The factual analysis which was appropriate under Section 1983 in this instance was thus very similar to that described in *Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 50 U.S.L.W. 4017, 4021 (Dec. 1, 1981):

> Petitioners will not recover damages under § 1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment. . . .

As thoroughly explained in the Court of Appeals opinion in this case, no evidence, even when "construed in the light most favorable" to Petitioner, established "any misrepresentation or concealment of a material fact in the conduct of negotiations." (Appendix at 13).

The holding in *Monroe* v. *Pape*, 365 U.S. 167 (1961) was not disregarded in this analysis. *Monroe* dealt with a different "intent" issue. As is clear from both the majority opinion and Justice Frankfurter's dissent, the issue presented was simply whether the specific intent necessary to prove a criminal violation under the holding in *Screws* v. *United States*, 325 U.S. 91 (1945) was also an element of civil liability under Section 1983. *See*, 365 U.S., at 187, and 206-208. This Court held it was not necessary to allege in a complaint "a specific intent to deprive a person of a federal right." 365 U.S., at 187. No such requirement was imposed upon Petitioner.

All that the lower courts required Petitioner prove was the element of scienter or intent necessary to support the claim that the 1971 transfer was tainted by fraud. (App. at 12-13). Intent to mislead or defraud is one of the standard elements of common law fraud under Ohio law. *E.g.*, *Block* v. *Block*, 165 Ohio St. 365, 135 N.E.2d 857 (1956) (Syllabus Para. 2). The same requirement of "an intention to cheat or be dishonest" also exists in federal law. *Loesch* v. *United States*, *supra* at 921, citing *United States* v. *Wunderlich*, 342 U.S. 98, 100 (1951). The application of this scienter requirements did no violence to *Monroe* v. *Pape*.

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). "Section 1983 by itself does not protect anyone against anything . . . The act only gives a remedy." *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979). Petitioner disregards this. It seeks to substantially amend the statute, in a manner wholly at variance with the intention of the Congress of 1871, the decisions of this Court, and common sense.

CONCLUSION

Full consideration of Petitioner's arguments by this Court is wholly unwarranted. Petitioner has had its day in Court, and a remedy under Section 1983 was fairly denied based upon the facts.

Respectfully submitted,

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Opposition

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No. 81-1171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NELLIE-JEANNE CORPORATION
An Ohio Corporation for Profit,
Petitioner,

v.

CITY OF COLUMBUS,
DIVISION OF RECREATION AND PARKS, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE 10th DISTRICT COURT OF APPEALS, FRANKLIN COUNTY, OHIO

RESPONDENTS BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petition filed herein for a writ of certiorari to the Franklin County, Ohio, Court of Appeals, does arise from the directed verdict and judgment thereon in the trial court and the affirmation of said judgment by the court of appeals.

The County of Franklin, Ohio, acquired legal title to the property in question as the result of subsequent industrial revenue bond financing by co-respondents Burgess et al. pursuant to Chapter 165, Ohio Revised Code.

Although the County of Franklin, Ohio, has been named as a party throughout the proceedings, it is merely the stake-holder and is not actually involved in the issues between petitioner and co-respondents.

CONCLUSION

Therefore, although the County of Franklin, Ohio, may be a necessary party, it has no interest in the outcome of the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Brief of Respondent were mailed to Charles E. Taylor, Attorney for Petitioner, 81 South Fourth Street, Columbus, Ohio 43215; Louis E. Gerber and Richard A. Frye, 180 East Broad Street, Columbus, Ohio, Attorneys for Burgess et al., and Gregory S. Lashutka and Gregory J. Dunn, 90 West Broad Street, Columbus, Ohio 43215, Attorneys for the City of Columbus, by regular U.S. mail this 14 day of January, 1982.

MICHAEL MILLER
PROSECUTING ATTORNEY